other papers not printed

No. 134

Office - Supreme Court, U. S.
FILED
NOV 6 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945

ANTONELLI FIREWORKS CO., INC., AMERIGO ANTONELLI, *et al.*,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

APPELLANTS' PETITION FOR REHEARING

WILLIAM J. MALONEY,
Attorney for Petitioners,
Office & P. O. Address,
601-602 Union Trust Building,
Rochester 4, New York.

GEORGE J. SKIVINGTON,
511-517 Wilder Building,
Rochester 4, New York.

CHARLES P. MALONEY,
602 Union Trust Building,
Rochester 4, New York.

RAY F. FOWLER,
733 Genesee Valley Trust Building,
Rochester 4, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Page

Appellants' Petition for Rehearing 1
Statement 9
The Law 23

POINT I.

The inflammatory summary in its setting in this case was inexcusable, and it cannot be disregarded or overlooked as harmless error 23

POINT II.

The Court's error in charging the jury on the effect to be given to testimony of character witnesses was prejudicial to the defendants, and should not be excused as harmless error 29

POINT III.

The conspiracy of which petitioners were convicted is identical with the conspiracy in the first indictment, on which they were acquitted, but in any event there was no evidence of a partnership or joint venture to defraud the government 33
Certificate of Counsel 38
Appendix "A" 39
Sumary of Cross-Examination of Government Witnesses 39

Table of Cases Cited.

Bihn vs. U. S., ... U. S. ..., 90 Law Ed. 1209 .....6, 24
Bollenback vs. U. S., 326 U. S. ..., 90 L. E. 402 21
Beckman vs. United States, 96 Fed. 2d 15 36

II.

Page

Braverman vs. United States, 317 U. S. 49, at page 53 .. 37
Cohen vs. United States, 282 Fed. 871 32
Culbert vs. United States, 146 Fed. 2d 10 32
Commonwealth vs. Haskins, 128 Misc. 60 37
Commonwealth vs. Lowery, 158 Misc. 18 37
Edgington vs. United States, 164 U. S. 361, at page 366 .....30, 31, 32
Furness, Withy & Co. vs. Yanz-Tsze Ins. Assn., 242 U. S. 430, at p. 434 .....2, 6
Hack vs. State, 141 Wis. 346, 352 4
Kotteakos vs. U S., ... U. S. ..., 90 Law Ed. 1178 ..6, 23
Kalamson vs. United States, 287 Fed. 71, 75 32
Latham vs. United States, 5 Cir., 226 Fed. 420, 425 22
McCandless vs. United States, 298 U. S. 342 25
Miller vs. United States, 120 Fed. 2d 968, 972 32
McAdams vs. United States, 74 Fed. 2d 37 32
Marino vs. U. S., 91 Fed. 2d 691 35
New York Central R. Co. vs. Johnson, 279 U. S. 310 .. 3
O'Neill vs. State, 189 Wis. 259, 207 N. W. 282 .....4, 7, 25
Oppenheim vs. United States, 241 Fed. 625, 628 31
People vs. Levan, 295 N. Y. 26, 36 .....4, 22, 25
People vs. Fielding, 158 N. Y. 542, 553 25
People vs. Espasito, 224 N. Y. 370 25
People vs. O'Dell, 230 N. Y. 481 32
People vs. Suffern, 267 N. Y. 115 36
Rosen vs. United States, 271 Fed. 651 32
Rosenthal vs. United States, 276 Fed. 714 37
Sunderland vs. United States, 19 Fed. 2nd 202, 214 32
Spiller vs. United States, 31 Fed. 2d 682 37
Tucker vs. Henniker, 41 N. H. 317, at page 325 22
U. S. v. Bayer, 156 Fed. 2nd, 964, 966-8, decided August 14, 1946 7
Union Pacific Co. vs. Field, 137 Fed. 14 25
United States v. Graham, 2 Cir., 102 F. 2d 436, 442 ... 29

Page

United States vs. Kuschner, 135 Fed. 2d 668 (Certiorari denied, 320 U. S. 212) 32
United States vs. Quick, 128 Fed. 2d 832 32
United States vs. Latin, 139 Fed. 2d 569 32
United States vs. Falcone, 107 Fed. 2d 579 (2nd Cir.) (Affirmed 311 U. S. 205) 35
United States vs. Silva, 131 Fed. 2d 247 35
United States vs. Dahley, 50 Fed. 2d 37 36
Viereck vs. U. S., 318 U. S. 236, at p. 248 ....2, 7, 20, 24, 25
Weiler vs. United States, 323 U. S. 610, 611 21

STATUTES.

Section 88, Title 18 of the U. S. C. A. 9
Section 103 of Title 50 of the U. S. C. A. 9

MISCELLANEOUS.

Bishop's New Crim. Proc. 2d Ed., Section 1015-A (5) .. 37
22 C. J. Sec., Vol. 22, Section 758, p. 1296 35
Wigmore, Evidence, Sec. 278 28

IN THE

Supreme Court of the United States

October Term, 1945

No. 134.

ANTONELLI FIREWORKS CO., INC., AMERIGO ANTONELLI, *et al.*,
Petitioners,
vs.
THE UNITED STATES OF AMERICA.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLANTS' PETITION FOR REHEARING

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Comes now Antonelli Fireworks Co., Inc., Amerigo Antonelli, John De Ritis, Joseph De Ritis and Dominick Barbollo, petitioners in the above entitled cause, by their counsel, and present this, their petition for a rehearing of the above entitled application for a writ of certiorari, and in support thereof respectfully show:

I.

On October 14, 1946 this Court denied the petition for certiorari, but granted the petition for leave to proceed

in *forma pauperis*. This petition is filed because of what is felt to be the importance in the administration of criminal justice of protecting those charged with crime from being prejudiced in the eyes of the jury by inflammatory remarks of Government counsel.

THE ENTIRE BASIS OF THIS APPLICATION FOR A REHEARING IS THAT IN PRESENTING THE PETITION FOR CERTIORARI, DEFENSE COUNSEL WERE NOT FAMILIAR WITH THE FACT, AS POINTED OUT IN THE FURNESS, WITHY & CO. VS. YANZTSZE INS. ASSN. CASE, THAT THE COURT ON SUCH APPLICATIONS DOES NOT READ THE RECORD. WE BELIEVED THAT THE RECORD WOULD BE READ AT LEAST TO THE EXTENT OF THE OPINIONS BELOW, AND THE PORTIONS DEALING WITH THE QUESTION AS TO WHETHER THE CASE WAS A "STRONG" CASE OR A "WEAK" CASE. FOR THAT REASON WE DID NOT AMPLIFY JUDGE FRANK'S ARGUMENT AS TO THE WEAKNESS OF THE CASE, NOR DID WE REPLY TO THE GOVERNMENT'S BRIEF ON THE SAME SUBJECT.

IF THIS REHEARING BE GRANTED, WE FEEL THAT THIS COURT WILL FULLY APPRECIATE THE UTTER *WEAKNESS* OF THE CASE AND GRANT A HEARING TO ENABLE US TO SHOW THE EXTREME HARMFULNESS OF THE ERROR COMPLAINED OF IN THE GOVERNMENT'S SUMMARY TO THE JURY, AND THE AWFUL EFFECT WHICH THIS APPEAL TO PASSION AND PREJUDICE HAD UPON THE JURY IN CONNECTION WITH ITS TIME AND SETTING.

The question is one of grave public importance. It was recently stressed by Chief Justice Stone in *Viereck vs. U. S.*, 318 U. S. 236, at p. 248, as follows:

> "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. We think that the trial judge should have stopped counsel's discourse without waiting for an objection. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. * * * It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' Berger v. United States, 295 U. S. 78."

Justice Stone, however, was merely emphasizing a principle of law of the gravest public importance, which has been uniformly adhered to in this Court.

It was emphasized in *New York Central R. Co. vs. Johnson*, 279 U. S. 310, in the following language:

> "The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice.
>
> * * * Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error."

Recent decisions of the Circuit Courts and of the highest tribunals of several of the states emphasize the importance of preserving the administration of criminal justice on a

high plane of impartiality, free from the influence of prejudice and passion. In one of these cases, it is stated:

> "* * * the district attorney who permits his zeal to secure convictions to cause him to disregard his duty as a 'sworn minister of justice' not only wrongs the defendant, he impedes the administration of criminal justice and brings the administration of the criminal laws into disrepute."
>
> *O'Neill vs. State*, 189 Wis. 259, 207 N. W. 282.

See also:

> *Hack vs. State*, 141 Wis. 346, 352.
>
> *People vs. Levan*, 295 N. Y. 26, 36.

The foregoing relates to assigned error No. 3, which is that "reversible error" was committed in connection with the inflammatory summation by the Government, and which summary is set out in Appendix at page 6 annexed to our petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals, Second Circuit.

That this summary was inflammatory and prejudicial was admitted by the Trial Judge when he stated (in answer to the objection to the summary that the "remarks of Government counsel in expressing his belief in the veracity of the Government witnesses was also done in a manner that was inflammatory and highly prejudicial to the defendants"):

> "I am inclined to think you are right about that, and I think that I will say something about that in my charge."

The Court also, in answer to the objection that the expression of Government counsel's "belief in the guilt of the defendants was also prejudicial to the defendants and inflammatory", stated:

> "I agree with you as to that also, and I had previously made a note of it. I intend to speak of that in my charge."

Objection was also made to that part of the summary which dealt with the rendering of a verdict

> "of which you can always be proudly justified in the presence of your fellowmen, those here at home who labor and have labored unceasingly in an honest effort to manufacture munitions of war as well as those of us beyond the seas who look to us for the things that they need to sustain them in their hour of extreme sacrifice." (Appendix p. 10, R. Vol. IV, p. 3802-D.)

The Circuit Court held that these objections were without merit because the remark was invited by a statement of one of defense counsel that "Government counsel knew this to be a weak case" (155 Fed. 2d 631, @ p. 637), and that any possible error was cured by the forthright charge of the court instructing the jury at the outset to disregard these remarks of Government counsel, since the function of determining such questions of fact was exclusively its own.

The Circuit Court also disposed of the final paragraph of the summary which dealt with the overseas remark, by saying thereafter the Court invited exceptions, and that when they were made "promised to take care of the matter in his charge—a course apparently completely acceptable to the defendants for they made no other suggestion" (*Id.* 637).

As pointed out by Judge Frank in his dissenting opinion, the Court did not promise to take care of this part of the summation, and furthermore, there was little more that the defendants could do other than to note their exception to the summary. The Court, however, later states that had the Judge not applied the extensive corrective measures he did, there would still be a question whether reversal would be required, and that "Though the remarks were ill advised and overzealous, they seem insignificant when prop-

erly considered in their setting." But apparently the Court disposed of the whole matter under its doctrine of "harmless error". The doctrine of "harmless error", of course, can only be applied in a "strong" case.

While Judge Frank pointed out in his dissenting opinion that this was a "weak" rather than a "strong" case, we feel that we should have amplified Judge Frank's discussion of the weakness of the case, and should have replied in detail to the Government's brief with reference to the facts, and that is the basis for this application for a rehearing.

We are frank to say that in preparing our petition and brief on this application, we were not familiar with the ruling of this Court in Furness, Withy & Co. vs. Yanz-Tsze Ins. Assn., 242 U. S. 430, at p. 434. An examination of our original petition clearly shows this. We did not discuss the facts there to any extent whatsoever, and we did not reply to the respondent's brief in detailing the testimony of its witnesses on direct examination, by showing that the testimony of those witnesses was in some instances completely discredited, and in others, greatly weakened by their cross-examination.

We will do this under another heading, but first we wish to direct the Court's attention to two cases, decided in this Court, both dealing with the issue of alleged "harmless error", since the filing of the petition herein, and also to a number of other decisions of this Court, and of the Circuit Courts, dealing with that issue. The two decisions of this Court, both decided on June 10, 1946, are:

Kotteakos vs. U. S.
U. S.
90 Law Ed. 1178
Bihn vs. U. S.
U. S.
90 Law Ed. 1209

Both of them were appeals from the Second Circuit, in one of which Judge Frank had filed a dissenting opinion, and in the other of which the unanimous decision of the Circuit Court was reversed. Since the rendering of those decisions, the Circuit Court has apparently reversed its position on the doctrine of "harmless error" and has written for reversal of a conviction in *U. S. v. Bayer,* 156 Fed. 2nd, 964, 966-8, decided August 14, 1946.

Petitioners respectfully suggest that there are three crucial questions in this case which have an important bearing on the administration of criminal justice, and which have been overlooked by this Court, and have been erroneously decided by the Courts below. They are as follows:

1. That the appeal to passion and prejudice in the summary of Government counsel was of such a character as to bring the administration of criminal justice into disrepute *(Viereck v. U. S.* and *O'Neill v. State, supra).*

2. That the Court erred in charging the jury as to the effect to be given to the testimony of character witnesses on behalf of the defendant, Amerigo Antonelli.

As to this charge, Judge Clark, in the prevailing opinion below, said:

> "Defendants' claim of error in the court's charge as to character evidence is perhaps their most important one, for it has some appearance of support from the precedents".

And he said further:

> "Defendants now claim that this charge constituted reversible error in the light of Edgington vs. United States, 164 U. S. 361, 366".

3. That the Court erred in denying the defendants' motion for dismissal on the ground that there was no evidence whatsoever of conspiracy. All of the alleged con-

spirators were witnesses on the trial. Not one of them testified to any agreement to defraud the Government, and such evidence as there was consisted solely of testimony of witnesses as to the giving of orders, principally by the foreman defendants, Bianchi, Piteo and Costanza. Not only that, but every one of the foremen defendants and all of the petitioners testified expressly that they had no intention to defraud the Government. Furthermore, if conspiracy can be spelled out of the four corners of the case, the conspiracy alleged in Count I of the first indictment (R. Vol. A, pp. 16-22), on which all of the defendants were acquitted, is identical with the single count of conspiracy alleged in the second indictment (R. Vol. A, pp. 38-50). The prosecution has never claimed and does not now claim that there were two agreements or conspiracies. It merely claims that the objects were different, ie., to violate different statutes. It says that both conspiracies (that is agreements or joint ventures) were to manufacture defective war materials (Brief p. 2). The evidence which respondent paraphrases is merely the giving of orders by the foremen to the workers to omit one increment when the inspectors were around or to pass defectively loaded material and in some instances, the giving or concurring in instructions of a similar kind by the petitioners or some of them (Brief pp. 4-7).

Even if the verdicts are not legally repugnant the fact of acquittal on one and conviction on the other is persuasive on the "weakness" of the case.

As to "1" and "2", the question of "harmless error" and "strong" case have an important bearing. As to "3", this is purely a question of law.

Statement

As heretofore pointed out, the five petitioners, with the three foremen (Piteo, Bianchi and Costanza) were indicted for conspiracy in connection with the manufacture of incendiary bombs and grenades, in violation of Section 88, Title 18 of the U. S. C. A. (R. pp. 34-50). The indictment was consolidated for trial with another returned on the same day against petitioners alone, charging manufacture of defective war materials with intent to injure the United States while at war, and conspiracy to commit that offense, in violation of Section 103 of Title 50 of the U. S. C. A. (R. pp. 13-33, 233).

Petitioners were all acquitted on the sabotage indictment, but convicted of the charge of conspiracy to defraud, although both conspiracy indictments were identical.

Of the three other defendants named in the latter indictment, two pleaded guilty and testified as Government witnesses (Piteo and Bianchi), and the third (Costanza) testified in his own behalf, and also on behalf of the Government, but was acquitted by the jury (R. 38-56).

The arrest and indictment of the defendants aroused intense prejudice and passion against them, abetted by the fact that the defendants were all of Italian extraction, and at the time of the indictment this country was actually at war with Italy, their mother country. This was manifested in the Court fixing bail for the petitioner, Antonelli, in the sum of $100,000, and as to the other defendants, in sums varying from $50,000 to $35,000 (R. p. 1969). Furthermore, the case was nearing its close at the time of the Normandy Invasion (June 6, 1944), and the summaries and charge of the Court to the jury were delivered on June 8th and 9th, 1944, respectively (R. 3801).

The Antonelli Corporation on November 27, 1941, was awarded a contract for the manufacture of some three million incendiary bombs (Gov. Ex. 1, R. p. 22), and thereafter and during the performance of that contract, and on July 27, 1942 was awarded an additional contract for the manufacture of one million incendiary hand grenades (Gov. Ex. 2, R. p. 31). Previous to this time, and in the early part of 1941, the company was awarded and completed a contract with the Picatinny Arsenal for loading and assembling black powder into an explosive bomb (R. p. 3421). It then obtained and executed a contract from the Navy Department for the manufacture of two hundred thousand smoke bombs, which was completed about August, 1941. It next obtained a contract from the Army for the loading of two million trench mortar cartridges, and while this contract was commenced before the awarding of the contract for the loading of the incendiary bombs, yet due to a defective formula it was not completed until after work was commenced on that contract, and ran concurrently with the latter contract until June of 1942 (R. pp. 3421-3425). The Company was also awarded a contract for the making of fuses to be used in the hand grenades, and this contract ran concurrently with the loading of the hand grenades.

It should be noted that no complaint of any kind was made as to the carrying out of these contracts, other than the contract for the loading of the incendiary bombs and hand grenades.

It should also be noted that the defendant, Piteo, had no connection with any of these contracts, as to which no complaint is made. This is of striking importance in view of the claim of the petitioners that Piteo is the one who designed the scheme for misloading the bombs and grenades by putting in a lesser number of increments and compres-

sions than required by the specifications, and instructing employees under him in so doing.

Costanza was also only connected with these two contracts as to which complaint is made. Bianchi was also connected with both of them, but was transferred to the fuse contract about December 1, 1942, and was supplanted by Costanza as foreman on the bomb and grenade contracts (R. p. 3027).

It would be strange indeed if there was a conspiracy between these petitioners and Bianchi that he would be taken from his key position in misloading bombs and grenades and placed in a position where proper manufacture was being carried on, and more strange would it be to supplant him with Costanza without having a thorough understanding with him. Costanza testified that the first he knew there was any misloading was when he noticed that Johanna Arnone's production markedly increased, and upon inquiry she told him that she was putting in only two charges, because they were hollering for production, and that Piteo told her to put in only two charges (R. pp. 3055-3058). He gives absolutely no testimony that he ever had any conference with any of the petitioners, or any agreement with them to misload either bombs or grenades.

The Government's case was made out by first calling witnesses as to the historical facts of the design, and showing the design of both types of bomb (substitute or steel bomb and magnesium bomb, and the incendiary grenades), the making of the contracts in question, the commencement of manufacturing operations, and the selection of bombs and grenades for testing, the making of the tests and the results thereof.

The testimony of these witnesses, being thirteen in number, comprised all of Volume I of the record on appeal,

and the first one hundred pages of Volume II (Vol. II, p. 1033).

It is significant that although the bombs were tested at a test pit at the company's plant all through manufacture, they never revealed any defect in putting in the correct number of burster bombs and the correct marking of bombs containing burster charges, nor any misloading of these bombs. It is also significant that although extensive tests of the bombs were made from the time of the arrest of the defendants, June 22, 1943, until the commencement of the trial on May 1, 1944, yet after the commencement of the trial an entirely new batch of bombs were selected and tested, and those are the ones that were examined at the University of Rochester (Vol. III, pp. 2208-2264—Exs. 121, 122 & 123).

The jury, had there been no error, could very well have considered that Antonelli was justified in relying upon the tests made at the plant, as did the Chemical Warfare Service officers, and could have considered that these meager subsequent tests were not sufficient to justify a wrongful inference, as did the Circuit Court in the prevailing opinion, wherein it is stated:

> "That there was defective manufacturing was thoroughly established; that it reached truly appalling amounts seems likewise clear". (155 Fed. 2d 631, at p. 634.)

It is also stated in the prevailing opinion that the testimony of the employee witnesses and of Government inspectors was sufficient to justify the jury in finding the defendants guilty. The Government in its reply brief on this application has also urged that the testimony of the numerous employees who worked at pouring or compressing the incendiary mix, together with the testimony of the three implicated foremen, was sufficient to make out a

"strong" case, and this, notwithstanding the denials of the defendants and of a greater number of employee witnesses who testiled for the defendants.

In the final analysis, and in view of the errors of an inflammatory summary, and of an erroneous charge as to character evidence, this all boils down to the question as to whether this evidence (together with the other evidence in the case) is sufficient to make out a "strong" case, so that the doctrine of harmless error can be applied. Judge Clark assumed that it was, but on the other hand, Judge Frank, in his dissenting opinion, points out that two of the Government's important witnesses were self-confessed accomplices; that there was uncontradicted testimony of witness intimidation by the Government (p. 658), and that the defective work may well have been due not to fraud but to the inexperience and incompetence of Antonelli and other defendant employees, and that the machines used in connection with the Government contracts left it up to the girl (rather than the use of an automatic process), for obtaining uniform compression (p. 644).

We submit that a review of the cross examination of the Government witnesses is sufficient to raise a serious question as to the guilt of the defendants on this charge of conspiracy, and we also submit that a review of the whole case will convince this Court that there isn't sufficient evidence, beyond a reasonable doubt, to establish the guilt of the defendants.

We therefore proceed to an examination of the testimony of these Government witnesses, which we set forth in Appendix "A" hereto annexed, for the double purpose of showing that their testimony was in some instances wholly discredited, and in others, greatly weakened by their cross examination, and to answer the Government's brief on this application.

The question at this point is whether it is to be considered a "strong" case or a "weak" case. On that question, however, the testimony of the defense must also be considered.

Each defendant took the witness stand. It was proven that no admission of any kind or nature had been obtained by the FBI from any one of them, although they were held in custody and questioned for long hours before being arraigned. On their cross examination not one of them was faced with one single statement based upon this interrogation by the FBI. This clearly shows that they must have told the truth to the FBI exactly as they did on the witness stand, and not one of them was asked on cross examination a single question as to any conspiracy or agreement.

We are not attempting at this time to argue *in toto* the weakness of the Government's case, but simply to set forth sufficient to indicate to this Court that it was far from a "strong" case.

Each of the petitioners denied categorically and specifically that they had ever given improper orders to the foremen, and denied specifically and categorically that they had entered into a conspiracy to cheat or defraud the Government (John DeRitis—R. pp. 2925, 2926, 2984, 2988, 2999, 3002, 3012; Joseph DeRitis—R. pp. 3319, 3328, 3339, 3342, 3396; Barbollo, R. pp. 3231, 3241, 3248; Antonelli—R. pp. 3538, 3541, 3555, 3633, 3634).

In addition to this, twenty-three employee witnesses testified in favor of the defendants expressly stating that they never received any improper instructions from any of the petitioners, and never heard them give any improper instructions to any of the foremen or other employees.

The Government's attempt to link Antonelli with any conspiracy is certainly far fetched. It is to be noted that

in every case where his name is mentioned, it was shown, that it was never done secretly, and that it was always in the presence of other persons. Even the Government witness, Schwartz, says that the conversation was in the presence of several people (R. pp. 1325-1328), although she paid no attention to the instructions (R. p. 1333), and Elsie Slocum admits that her discussion with Antonelli as to reject grenades was in the presence of two Government inspectors (R. p. 1524) and that the plant representative, Capt. Thompson, was called in (R. p. 1526).

Bianchi says that the incident of his reporting to Antonelli of production being pretty good by putting in only three charges, and Antonelli's reply that "that is the way to do it—to put them out like that", was in the presence of *someone else* (R. p. 1950), and Costanza says that the incident of putting in a couple of charges was in Italian dialect different from his own (R. p. 3171), and that he didn't know "if he was joking me or what so I didn't pay any attention to it at all" (R. p. 3061).

The Circuit Court's opinion also in part predicates its decision of a "strong" case on the assertion that these petitioners were the ones who profited by the misloading. As to this, there is not one syllable of evidence in this record that the DeRitis Brothers or Barbollo were ever to receive, or did receive, one cent of profit or compensation based in any way upon an increase of production due to misloading. Not a word of evidence that even the foremen were to receive any additional pay or compensation based upon such a plan. Not a word of testimony that any of the workers were to receive any such compensation. In fact, the alleged promised increase to the witness, Edith Gifaldi, was never made, and not a word of testimony that she ever received one cent of additional compensation by

reason of misloading (R. 1679). This fact alone is the most convincing proof that her testimony as to this incident was wholly false.

We have already pointed out that even Antonelli could not gain any additional profit by increasing production through the plan of misloading the bombs and grenades.

As to Barbollo, there is not a word of testimony that he ever conspired with the other defendants. The only evidence against him of wrongdoing, if any, is the testimony of Violet Stewart that she saw Barbollo pick up some rejects and put them on the table (R. p. 1154), and of Elsie Slocum, who simply said that she told Barbollo that the first fire in the grenades was protruding through the adapter in about two boxes, and that he expressed the opinion, that they were all right (R. p. 1525), and that he was present during her discussion with Antonelli, which was in the presence of two inspectors and of Captain Thompson (R. 1526).

But as against this, the record shows that the Government had previously called fourteen witnesses who had either been employed in or whose duties required them to be stationed in or about the assembly room, over which Barbollo was foreman. Of these, seven testified positively that they had never seen anything wrong in the assembly room under Barbollo; had never heard him give instructions or directions to anyone to do anything wrong. They are Nathenson (R. pp. 1203, 1205, 1222); Vacarelli (R. pp. 1393-1408); Fazio (R. pp. 1477-1478); Doctor (R. pp. 1508-1514); Inspector Keane (R. pp. 914, 933); Lt. Brown (R. p. 364); Lt. Thompson (R. p. 543). In fact, the witness Fazio said that Barbollo impressed upon her that she was to be careful and to do good work.

Five of these fourteen witnesses testified that they worked in the assembly room under Barbollo, but gave absolutely no evidence of wrongdoing or wrong instructions on his part. They are Arnone (R. p. 1039); Molinari (R. p. 1597); Mary Gifaldi (R. p. 1622); Edith Gifaldi (R. p. 1674); DeFilippo (R. p. 1714).

Not only that, but nine defense witnesses who worked under Barbollo testified positively that they never saw anything wrong, and never heard wrongful instructions given by him, nor heard of any attempt to pass rejected materials. They are Sinare (R. p. 2455); Leonardo (R. p. 2490); Amrose (R. p. 2515); Rotoli (R. p. 2648); Carcy (R. p. 2631); Leone (R. p. 2648); Bianchi (R. p. 2667); Mason (R. p. 2692); Sweeting (R. p. 2707); Smith (R. p. 2723).

We, therefore, urge that this record is more than sufficient to show that the Government's case was not "strong".

In the Government's brief on this application, they call attention to a remark made by Charles P. Maloney, one of the defense counsel, in his summary, to the effect that the Government's case was a "weak" case. The prevailing opinion also refers to this remark (pp. 637, 642).

We think it is quite apparent from the record that he was referring to the sabotage indictment, with its one count of conspiracy and fourteen substantive counts. That part of the case was certainly weak, and the jury took little time to find it so.

It is to be remembered that the jury returned in to court approximately six hours after the case was submitted to them, and that the court's charge on the jury's question entirely disposed of this sabotage indictment in the minds of the jury, and it is, therefore, apparent that the jury

spent from that time until their returning into court with their verdict deliberating on this fraud charge.

The record shows that the matter was finally submitted to the jury at 11:00 A. M. (R. p. 3852); they came back into court at 4:57 P. M. on the same day and asked this question with reference to the sabotage indictment. THEY THEN CONTINUED TO CONSIDER THE MATTER UNTIL MIDNIGHT OF THAT NIGHT WHEN THEY WERE PUT TO BED (R. p. 3855). THEY RESUMED DELIBERATION THE FOLLOWING MORNING AND A VERDICT WAS NOT REACHED UNTIL 11:35 A. M. ON THAT DAY (R. p. 3856). THEREFORE, SUCH A STATEMENT WAS NOT ONLY ENTIRELY JUSTIFIED BUT IS PROVEN TO BE TRUE FROM THE RECORD ITSELF, AND CERTAINLY CANNOT BE SAID TO ELICIT AN APPEAL TO PASSION AND PREJUDICE FROM THE PROSECUTOR.

That the prosecutor realized that the Government's case was "weak" is patent from his expressed predication of his remarks upon this statement that he "knew this to be a weak case". He did not at the time claim that defense counsel had failed to "eschew the emotional" as now claimed by the Government in its brief (p. 11), nor did he claim that defense counsel had "pitched the case in a key which would explain, if not justify" his relapse from the moderate (p. 11). On the contrary, he accused the defense counsel of being too blunt because they used the word "sabotage" frequently throughout the trial, whereas Government counsel "not once * * * attempted to use that word to prejudice you or instill in you some special concern because of the war" (R. 3802-A).

The court below also stated that,

> "While the summations of defense counsel were not reported, part of the challenged argument here was

> expressly stated as a reply to an assertion of a defense attorney that government counsel knew this to be a weak case." (Opinion, p. 637.)

It is, therefore, impossible to spell out at this time that this inflammatory summary was in any way in reply to over-zealous or emotional appeals on behalf of the defendants.

The respondent's brief further seeks to justify the verdict by reason of the fact that the defense did not move for a mistrial, and that the court on the following morning had sufficiently admonished the jury to disregard the offensive remarks, and they say "the record does not permit an appraisal of the extent to which the 'men over seas' remark of the prosecutor may have been provoked by the argument of defense counsel." The answer to this is that the record does in and of itself furnish this appraisal and it also demonstrates the devastating effect of the inflammatory records on the jury as we shall now attempt to point out:

A. It is evident that defense counsel were completely astounded by the appeal which was compressed into the prosecutor's closing remarks. The Court itself was also appalled by this appeal to passion and prejudice, and when recovered he said:

> "Do you have something to say? I was waiting for you if you had something to offer now. I just wonder if you have any exceptions to note now, exceptions to remarks?" (R. p. 3803.)

Defense fearing that comment upon the remarks in the presence of the jury would only intensify their effect (as is often the case), asked that the jury be excused. Thereupon the objections were entered.

In response to the remark expressing belief in the veracity of Government witnesses being done in a manner

"that was inflammatory and highly prejudicial to the defendants", the court replied:

> "*I am inclined to think you are right about that,* and I think that I will say something about that in my charge." (Emphasis supplied.)

In response to the expression of counsel's "belief in the guilt of the defendants" being also prejudicial to the defendants and inflammatory, the Court replied:

> "*I agree with you as to that also,* and I had previously made a note of it. I intend to speak of that in my charge."

The Court at the outset charged that the province of the jury of determining the truth or falsity of any testimony "may not be invaded even by the Court, and certainly not by the attorney for the Government" (R. p. 3807). He also said that the expression of counsel's "belief in the guilt of the defendants" "also was improper", and as to the "over seas" remark, said:

> "What some one may think of your verdict, whether that some one be a citizen at home or whether he be one of the boys overseas, should in no way influence you in your consideration of this case." (R. p. 3808.)

At most this was a mild rebuke, and the Court softened it by saying that he did not mean to infer that it was intentionally done, and as to the closing remarks, by saying that they may have been inadvertently made.

This falls far short of extensive corrective measures, or of a swift and sure rebuke, as stated in the prevailing opinion (p. 638). Furthermore, the Judge's charge did not meet the very minimum requirement laid down by this Court in *Viereck vs. United States, supra,* which is as follows:

> "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the

> jury were *highly prejudicial*, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. We think that the Trial Judge should have stopped counsel's discourse without waiting for an objection".

The inflammatory summary complained of in the Viereck case is indeed mild as compared with the summary in this case *(Id.* 248, footnote 3).

We respectfully suggest and urge that this Court cannot, under the rule laid down in the Viereck and Berger cases, uphold the attempt of the Government to sustain this summary, nor the attempt of the Circuit Court to uphold it because defense did not make the proper objection, and did not move for a mis-trial, because of this Court holding that it was the duty of the Trial Judge to stop the prosecutor and rebuke him without waiting for an objection.

We also respectfully urge that this Court has overlooked these important decisions, and that this Court is on record as saying that these matters cannot be disregarded as harmless errors.

In *Weiler vs. United States,* 323 U. S. 610, 611, this Court said:

> "We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility."

See also *Bollenback vs. U. S.,* 326 U. S. , 90 L. E. 402.

That the summary did in fact influence the jury is manifest, because the jury after disposing of the sabotage indictment spent some eighteen hours deliberating on the

conspiracy indictment. They were out all night, and as Saturday noon was approaching, as was also the time when they must face their fellow men and justify their verdict before them, "as well as those * * * beyond the seas, who look to [them] * * * to sustain them in their hour of extreme sacrifice", it was then that the deadly effect of the virus, implanted in their minds by the closing remarks in the summary, manifested itself. It was then that the evidence, not of witnesses but of the opinion of the prosecutor, became the deciding factor.

As the Court said in *Latham vs. United States,* 5 Cir., 226 Fed. 420, 425:

> "Such remarks unavoidably operate as evidence".

In *Tucker vs. Henniker,* 41 N. H. 317, at page 325, the Court said:

> "Yet the necessary effect is to bring the statement of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in the slightest degree influenced the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. * * * It is unreasonable to believe the jury will utterly disregard them. They may struggle to have done so, and still be led involuntarily to shape their verdict under their influence. * * * To an extent not definable, yet to a dangerous extent, they (these remarks), unavoidably operate as evidence which must more or less influence the minds of the jury * * *."

In *People vs. Levan,* 295 N. Y. 26, at page 36, the Court says:

> "The virus thus implanted in the minds of the jury is not so easily extracted" [that is by a corrective charge.]

THE LAW

POINT I

The inflammatory summary in its setting in this case was inexcusable, and it cannot be disregarded or overlooked as harmless error.

We understand the law, as now laid down by this Court in *Kotteakos vs. United States, supra,* to be as follows:

> "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. * * * Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment".

Certainly to say that this Court can be certain that this inflammatory summary did not prejudice these petitioners in the light of the "setting" of the entire case is to overlook the fact outside of the actual testimony—that Italians were being tried when we were at war with Italy—a sabotage indictment, on which they were acquitted, had been joined for trial with a simple fraud indictment, and the matter went to the jury the same week as the invasion of Normandy occurred. These facts in judging "the setting" of the case are as important, if not more important, than the actual testimony itself.

We have demonstrated in the foregoing statement that (a) the summary was highly inflammatory and prejudicial; (b) that it was not invited nor was it the result of intemperate remarks on the part of defense counsel; (c) that the record itself shows that it was based solely upon the fact clearly proven that the Government's case was "weak".

That the resort to an appeal to passion and emotion was a confession of weakness; that the Trial Judge who heard the case appraised it, then and there, as highly inflammatory and highly prejudicial. We have also demonstrated that the record clearly discloses that the jury was in fact influenced by it; (d) that the Circuit Court was in error in holding that the attack was either invited or was cured by "extensive corrective measures"; that the "rebuke" did not meet the minimum requirement of the Viereck case, because it was neither stern nor prompt. The prosecutor was not "stopped", and the mistrial was not directed.

Neither can this be excused by the failure of defense counsel to move for a mistrial, because as Chief Justice Stone says, "the trial judge should not even have waited for an objection". Furthermore, the trial judge indicated what his ruling would be on such a motion when he said:

> "I think I will say something about that in my charge." (R. p. 3804.)

And again when he said:

> "I think I will speak particularly about that",

and later:

> "I had previously made a note of it. I intend to speak of that in my charge." (R. p. 3805.)

Again at the outset, the Court invited only "exceptions to remarks", and did not indicate that he intended to grant a mistrial.

Bihn vs. United States, supra, decided in this Court on June 10, 1946, also deals with the doctrine of "harmless error", and this Court reversed the Second Circuit, saying:

> "It seems plain that the inflection or tone of voice used in giving the challenged instruction could make it highly damaging".

The Court further said:

> "We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears.

> * * * Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor abberation of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See Bollenbach v. United States, 326 U. S. ."

If confusion in a charge to the jury forbids applying the rule of "harmless error", certainly an inflammatory summary at the close of the Government's argument is far more harmful and prejudicial to the defendants, especially in the light and effect and dates of the facts of this case.

That the Trial Judge only mildly counseled the jurors on the subject was not in fact corrective. As Judge Frank says:

> "The inflammatory and highly prejudicial character of such a gross stimulation of such patriotic sentiments when a criminal trial is conducted in wartime has been universally recognized. * * * Nor heretofore has any court deemed such remarks harmless because compressed into a single sentence, for experience teaches that a poisonous suggestion of that kind needs no elaboration. As I shall show below, the courts have frequently held that this type of error cannot be eradicated by a cautionary instruction or even by an immediate severe censuring of offending counsel".

See also *McCandless vs. United States*, 298 U. S. 342.

Viereck vs. United States, 318 U. S. 236.

Union Pacific Co. vs. Field, 137 Fed. 14.

O'Neil vs. State, 189 Wis. 259.

People vs. Levan, 295 N. Y. 26.

People vs. Fielding, 158 N. Y. 542, 553.

People vs. Espasito, 224 N. Y. 370.

On the question of "strong" case or "weak" case, it can not be overlooked nor glossed over that there is extensive evidence in this record of witness intimidation, most of it wholly uncontradicted.

Costanza after testifying on direct examination that the first that he observed of anything wrong in loading the bombs was when Johanna Arnone took Nina LaDelfa's place and that then production started to increase, that he investigated, and that Arnone told him she was putting in only two charges because they were all hollering for production, and she further stated that Piteo told her to put in only two charges (R. 3057-3058). Costanza said on cross examination that he did not tell the inspectors about Piteo's orders nor did he tell Antonelli or the DeRitis boys about it (R. 3097). He said that he was not guilty of any of the offenses charged against him and had no intention of making any profit anywhere (R. 3110). He then said that the FBI tried to get him to make statements of things that were not true; that instead neither Antonelli, the DeRitis boys or any one else had told him to watch out for inspectors (R. 3174) and said finally that the FBI agents gave him to understand that "they would make things easy for him" if he "cooperated with him", and that while they could not promise to get him off completely, they would see to it that everything would go easy for him.

Beatrice DeFilippo, the witness who was "let out" by the petitioners (R. 1725) testified on cross examination that when interviewed by the FBI they had assured her that if she would testify in a certain way she would have nothing to fear; she said she was frightened because she had been informed by the agents that she had committed a crime and it was then that the assurance was given to her that she would have nothing to fear and she said that that was the

reason why she did not have fear (R. 1751). She also admitted that in the statement she first signed for the FBI that she didn't say anything about Mr. Antonelli being in any way connected with wrong-doing (R. 1731) and when her attention was called to her testimony at the preliminary hearing, wherein she said that in answer to the question "Did you receive any instructions of ever placing burster bombs into burster type box" and that she had answered, "yes, it was done. I never received instructions though", admitted that she did so testify (R. 1755).

Although it was not substantially denied that Johanna Arnone, Teresa Molinari, two defense witnesses, and their mother, Lucy Siglione, another employee, had made an arrangement to go to the office of defense counsel, so that he could interview them in connection with the preparation for the defense, but when DeRitis called for them, they told him that they had been advised by Kiefer, an FBI agent, not to do so (R. 1094, 1608 and 1620). Both of these witnesses testified that they were frightened when they were interviewed by the FBI (R. pp. 1137, 1607).

Piteo, a self-confessed accomplice, but one of the chief witnesses for the government, admitted on cross examination that on the very morning of the day that a witness was to testify for the defense, that he went to the witness' house and told him "if he knew what was good for him, he would get out of this lawsuit and not testify for the defense" (R. p. 1866).

Another defense witness, Alice LaBrutto, testified that Piteo came to her house after he had testified on the case, told her that he had heard she was to be the first witness for the defense and said "you better not go on the stand because you will be better off", and on several previous occasions told her she would be better off if she refused to testify (R. pp. 2434-2435).

None of this testimony was denied. Furthermore, the FBI agent, Kiefer took the stand in rebuttal but was not asked a single question with reference to witness intimidation and did not deny that he had told witnesses not to go to the office of defense counsel (R. p. 3746). Furthermore, Piteo admitted in connection with his interviewing witnesses for the government that he had said time after time "I am going to save my own skin in this deal" (R. p. 1867). He also admitted that he was in the habit of testing the bombs.

The witness, Mildred Hinkley, sister of Beatrice DeFelippo, testified on her direct examination that at one time Antonelli came to the press house and said to change regular bombs to the burster boxes and that a little later Joe DeRitis gave her similar directions (R. pp. 1781-1782). On cross examination her attention was called to her testimony on the preliminary examination wherein she was asked with reference to the changing of plain bombs to the burster boxes and that she said the only person present at the time was Bennie Piteo. She attempted to quibble as to having named Joe DeRitis and Antonelli but the court interjected, saying "if she was asked who was present and she gave that answer, I think it is fair to assume that that is all" (R. p. 1793). This witness also admitted on cross examination that when questioned by FBI agents she was told that it was a serious offense, that she was frightened and scared, and that it was after she had been impressed with the seriousness of the case that she mentioned the names of DeRitis and Antonelli (R. p. 1808).

Wigmore, Evidence, Sec. 278, says:

> "It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all simi-

> lar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one, and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause * * *. As the general principle applies in common to all these forms of conduct, it is not necessary, nor is it usually possible, to discriminate the precedents that apply it in one or another form. Roughly classifying them, they admit all forms of personal falsification by the party in the course of the litigation; fabrication or manufacture of evidence by forgery, bribery, subornation, and the like; suppression of evidence, by *intimidation*, eloignment, or concealment *of witnesses* or material objects * * *."

This applies to the government as well. *United States v. Graham*, 2 Cir., 102 F. 2d 436, 442.

POINT II

The Court's error in charging the jury on the effect to be given to testimony of character witnesses was prejudical to the defendants, and should not be excused as harmless error.

The Court's charge was as follows:

> "A number of witnesses have testified here as to the reputation of Antonelli and Costanza for truth, veracity, honesty and integrity. These are known as character witnesses. Evidence of good character is not in and of itself sufficient to raise a reasonable doubt as to the guilt of any defendant except when, in the judgment of the jury, the defendants character is so good as to raise a reasonable doubt of the positive evidence against him." (R. p. 3849.)

In view of the public hostility which had been aroused against the petitioners at the time of their arrest, and

particularly in view of the fact that the flames of bias and prejudice against petitioners were fanned by the closing summary of the prosecutor, it was of the utmost importance that the Court's charge on character evidence should have been clear and unambiguous.

As heretofore pointed out, the evidence against petitioners consisted chiefly of the testimony of the two foremen defendants who had pled guilty, and who on their own testimony were accomplices. They were supported, at most, by the varying testimony of the third foreman, Costanza, and by the dubious testimony of some fourteen, (out of a total of three hundred fifty employees), who must also be deemed accomplices of the foremen, and by the discredited testimony of the Government inspector, Elsie Slocum. Six character witnesses testified as to the good character and reputation of Antonelli for honesty, integrity and loyalty (R. pp. 3593, 3660-3672). These men are all outstanding citizens of Rochester, where Antonelli has lived for more than twenty-five years, and their evidence was entitled to the greatest weight.

These petitioners were entitled to an unequivocal instruction in accordance with the leading case of *Edgington vs. United States*, 164 U. S. 361, at page 366, which holds as follows:

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing."

In *Oppenheim vs. United States*, 241 Fed. 625, 628, the Second Circuit said:

> "Evidence of good character may itself create a reasonable doubt when without it there would on the other evidence be no reasonable doubt, whereas the Trial Judge held that evidence of good character would only create a reasonable doubt if the evidence without it was evenly balanced."

The instruction given by the Trial Judge was contrary to the holding in the above cases. He charged:

> "Evidence of good character is not in and of itself sufficient to raise a reasonable doubt as to the guilt of any defendant except when, in the judgment of the jury, the defendant's character is so good as to raise a reasonable doubt of the positive evidence against him".

Emphasis was placed upon the fact that the jury was to understand that good character in and of itself is not sufficient to raise a reasonable doubt. The last part of the charge left it to the jury to say whether defendant's character was so good as to raise a reasonable doubt of the positive evidence against him. The jury was not guided as to what was meant by "so good as to raise a reasonable doubt", but was told that the matter was left entirely to its own judgment. It can be inferred that the jury could altogether reject the testimony as to good character, and substitute their own judgment as to what they thought the defendant's character was.

The majority below, although saying that the defendants' claim of error as to this part of the charge "is perhaps their most important one, for it has some appearance of support from the precedents", disregarded the error because defense counsel made no request for a charge on character testimony, but held that the charge itself did not run afoul of the Edgington case (Opinion pp. 639, 640).

We respectfully submit that when the charge is examined, in the light of the Edgington case, that it did not meet the requirements of that case, because the circumstances in this case were such "that an established reputation for good character * * * would alone create a reasonable doubt", even though the other evidence could be said to be convincing.

Edgington vs. United States, supra.

We respectfully urge that this error alone calls for a reversal of the judgment.

See also *Sunderland vs. United States,* 19 Fed. 2nd 202, 214.

Miller vs. United States, 120 Fed. 2d 968, 972.

Cohen vs. United States, 282 Fed. 871.

It was especially important that the jury should have been properly charged on this subject, as the evidence against petitioners consisted almost entirely of the testimony of self-confessed accomplices.

Culbert vs. United States, 146 Fed. 2d 10.

United States vs. Kuschner, 135 Fed. 2d 668. (Certiorari denied, 320 U. S. 212.)

United States vs. Quick, 128 Fed. 2d 832.

Rosen vs. United States, 271 Fed. 651.

United States vs. Latin, 139 Fed. 2d 569.

McAdams vs. United States, 74 Fed. 2d 37.

Kalamson vs. United States, 287 Fed. 71, 75.

People vs. O'Dell, 230 N. Y. 481.

POINT III

The conspiracy of which petitioners were convicted is identical with the conspiracy in the first indictment, on which they were acquitted, but in any event there was no evidence of a partnership or joint venture to defraud the government.

It must be remembered that in this case every one charged with conspiracy testified as witnesses to the trial. The three foremen defendants were willing witnesses for the Government, and had there been an agreement to defraud it would certainly have been revealed directly in their testimony. It is not a case where the conspirators either did not take the stand or where, if they did take the stand they denied any agreement among them, in which event conspiracy might be proven by circumstantial evidence or by a series of overt acts showing the defendants working in concert.

The Court's charge to the jury on the question of conspiracy that "by its very nature the crime of conspiracy is provable by circumstantial evidence", and that testimony regarding various acts and circumstances and overt acts performed in connection with the agreement was sufficient to raise the inference that a conspiracy existed, was abstract and had no application to the facts of the case.

Not one of these witnesses testified that there was ever any meeting of the conspirators, or any agreement between

them.* At most, they say they were given orders by one or more of the petitioners to decrease the required increments. The giving of orders by superiors certainly does not constitute a conspiracy, particularly in view of the fact that not one of the foremen testified that they were to receive the slightest compensation for deviating from the specifications, and there is not a word of testimony that the DeRitis Brothers or Barbollo were to receive, or did receive, any compensation, and no evidence that any of those persons had the slightest stake in such a venture.

---

* Footnote 1

Piteo said that he did not have the slightest intention of defrauding the government (r. 1857), that it was his idea that he would get off easier by pleading guilty (r. 1859) and admitted that he had made the statement "I am going to save my own skin in this deal," (r 1867), and admitted that he personally used to test the bombs and said he never heard any complaint about them. He did not corroborate the government witnesses, Elsie Slocum, Edith Docteur or Edith Gifaldi.

Bianchi testified that he thought that by pleading guilty he would help his situation (r. 1966) but said that he had no intention to hurt the war effort, that he had no intention to defraud the government or commit a crime, that he had hopes that by testifying for the government, it might help his situation.

Costanza said he never had any discussion with Elsie Slocum about grenade cans, which had been marked with a red crayon (r. 3042); that the first he knew of improper loading was the Arnone incident; that after he was interviewed by the FBI, he denied being interviewed by DeRitis brothers (r. 3074); that he never knew of anything really wrong at the plant, that he had no intention of hurting the war effort or defrauding the government, and that he got only his regular wages (r. 3077, 3110).

John DeRitis testified he never issued any orders to the foremen or to others (r. 2964); that when he first learned of the investigation, he asked Teresa Molinari and other employees whether there was anything wrong with the work at the plant, that they assured him that there was not and said it was just a routine check-up of the employees (r. 2981). He specifically denied testimony of all witnesses who in any way involved him in the giving of improper orders and denied that he had any intention in any way of injuring the war effort or defrauding the government (r. 2999, 3009).

Barbollo testified that he never knowingly placed defective bombs in a cluster (r. 3231), and that he never had any knowledge of the improper loading or clustering of bombs (r. 3238, 3246), and that he never conspired with any one to defraud the government or do anything wrong (r. 3249); that he never received any compensation other than his regular wages (r. 3218).

Joe DeRitis testified that he never knew that Piteo, Bianchi and Costanza had given orders to misload the bombs, that he never heard any reports from government inspectors to that effect or that the bombs were not meeting the test (r. 3342) and that he never conspired with any of the defendants to in any way violate the government contracts (r. 3344).

Antonelli specifically and categorically denied any knowledge of misloading bombs or grenades and testified that he had no intention of defrauding the goverment or violating his contract or his duty as a citizen (r. 3634).

The rule with reference to proof of conspiracy is stated in *22 C. J. Sec., Vol. 22, Section 758, p. 1296,* as follows:

> "There must, as a rule, be proof of conspiracy apart from any acts or declarations of the co-defendants or of the alleged conspirators, for it is held that the conspiracy cannot be established by the acts and declarations of conspirators done or made in the absence of, or without the knowledge of, accused".

In *Marino vs. U. S.*, 91 Fed. 2d 691, the Court says:

> "* * * an accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act he does not violate the statute unless he joined in the agreement".

In *United States vs. Falcone,* 107 Fed. 2d 579 (2nd Cir.) (Affirmed 311 U. S. 205), Judge Learned Hand said:

> "* * * he (defendant) must in some sense promote the venture himself, making it his own, have a stake in its outcome".

In *United States vs. Silva,* 131 Fed. 2d 247, the Court said:

> "It was necessary to show that the appellant had agreed to act in concert with someone to commit the substantive crimes charged. If such agreement had been proved, the appellant's rental of the premises was, of course, enough to satisfy the need for some overt act in furtherance of the contract but without evidence from which a *partnership* in crime could, at least, fairly be inferred her acts must be treated as hers alone". (Emphasis supplied.)

We strongly urge that a review of the cross-examination of the Government witnesses, as set forth in the Appendix hereto annexed, will demonstrate that the only conclusion which can fairly be drawn from the Government's case is that Piteo and Bianchi, and their workers, in order to more easily perform their tasks to meet the universal demand for "more production", or as they characterized it, to pre-

vent being "hollered at", adopted this method of misloading the bombs and grenades. Based upon this conception, which is clearly deducible from the record, the evidence is equally, if not more, consistent with the innocence of the petitioners than it is with their guilt.

United States vs. Dahley, 50 Fed. 2d 37.
Beckman vs. United States, 96 Fed. 2d 15.

In *People vs. Suffern*, 267 N. Y. 115, a case in which certain defendants and their employees were charged with conspiracy, the Court said:

> "Regardless of the question of whether the indictment is or is not sufficient, and regardless of the alleged errors in the charge, the conviction cannot be sustained, for the reason that the evidence does not warrant a finding beyond a reasonable doubt that appellants are guilty of the crime charged. * * *
>
> Circumstantial evidence to justify the inference of guilt must exclude to a moral certainty every other reasonable hypothesis. It is of no value if consistent with either the hypothesis of innocence or the hypothesis of guilt. It is not enough if the hypothesis of guilt will account for all the facts proven. People vs. Razezicz, 206 N. Y. 249."

As we have pointed out in our analysis of the two counts of conspiracy which were submitted to the jury, they are to all intents and purposes identical. They charge and allege the same identical conspiracy with the same period of existence, the same overt acts, the same individuals, and the same individuals are charged with having participated therein (Appendix, p. 3).

The respondent does not claim that there were two agreements. It simply claims that the objects of this conspiracy were different. That while there was only the one agreement to manufacture defective war materials, in the first indictment the purpose was to interfere with the war effort,

and in the second indictment, that the purpose was to defraud the Government.

In *Braverman vs. United States,* 317 U. S. 49, at page 53, this Court says:

> "* * * Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. *The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.*"

In criminal cases no form of verdict will be good which creates a repugnancy or absurdity in the conviction.

Bishop's New Crim. Proc. 2d Ed., Section 1015-A (5).

Rosenthal vs. United States, 276 Fed. 714.

Commonwealth vs. Haskins, 128 Misc. 60.

Commonwealth vs. Lowery, 158 Misc. 18.

Spiller vs. United States, 31 Fed. 2d 682.

WHEREFORE, upon the foregoing grounds, and in the interests of justice, it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Circuit Court of Appeals be, upon further consideration, reversed.

Dated: October 31, 1946.

Respectfully submitted,

WILLIAM J. MALONEY,
Attorney for Petitioners,
Office & P. O. Address,
601-602 Union Trust Bldg.,
Rochester 4, New York.

GEORGE J. SKIVINGTON,
511-517 Wilder Building,
Rochester 4, New York.

CHARLES P. MALONEY,
602 Union Trust Building,
Rochester 4, New York.

RAY F. FOWLER,
733 Genesee Valley Trust Bldg.,
Rochester 4, New York.

of Counsel.

Certificate of Counsel

The undersigned hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Dated: October 31, 1946.

WILLIAM J. MALONEY,
601-602 Union Trust Bldg.,
Rochester, New York.

APPENDIX "A".

Summary of Cross-Examination of Government Witnesses.

The Government called three Chemical Warfare Service Inspectors. They are Clifford F. Keane (R. p. 940), Lester Nathenson (R. p. 1191), and Elsie Slocum (R. p. 1517). Of these, neither Keane nor Nathenson gave one syllable of evidence of any improper workmanship or any improper conduct on the part of any of the defendants. In fact, on cross-examination Keane testified that he believed he did a good job of inspection; that the inspectors under him performed their duties properly (R. p. 915), and that he knew of no wrongdoing at the plant while he was there, and that the tests were satisfactory (R. pp. 993-999). He also admitted that the Government inspectors had as much opportunity to see what was going on in the press rooms as did the petitioners (R. pp. 961-962).

On cross-examination Nathenson testified that he made tests to determine whether the proper quantity of therm-8 was used to produce the number of bombs manufactured, but that it never ran over (R. p. 1210), and that Antonelli could have relied upon the certification of the inspectors that the bombs were made in accordance with the contract (R. p. 1215). He said that he never saw anything wrong with the production at the plant, except on one occasion when he found a girl using a larger cup (R. p. 1222); that he reported this to Captain Thompson, the C. W. S. plant representative, but that he did not report it to Antonelli (R. p. 1225); said that the tests were normal; that he never found a bomb marked with an "x" that did not have a burster charge, and that he never had any reason to believe that the bombs which were taken out for testing were

anything other than the ones that the Government had set aside, and that he believed to this day that there was nothing wrong about that (p. 1233); that he never saw any indication on the part of Antonelli to shorten up the work or to cheat on it (R. p. 1238); that surveillance bombs were taken from the production line to be clustered (R. p. 1266); that his job was to see that the manufacturing was done according to specifications (R. p. 1276).

This leaves of the inspector witnesses only Elsie Slocum. She is the one referred to in Government's brief at page 7 as having testified that around Thanksgiving time she noticed that the first fire was protruding through the adapter in some grenades, and on another occasion, she marked a number of grenades which she had rejected, but later noted the grenades coming through again.

As to the first incident, it later developed that these two boxes of grenades had been produced by the previous shift and had been inspected (R. p. 1571), and that it was only a question between her and Antonelli as to whether the grenades should be rejected, and that Antonelli accused her of deliberately rejecting material that was good (R. p. 1564).

When first pressed on cross-examination, as to this incident, she said that she couldn't remember whether these grenades had been produced on the night shift, but finally in answer to the Court's question:

> "You knew someone had made them before; you knew they were made, at least",

she answered "Yes", and then said that she knew that they had already been inspected (R. p. 1571).

Certainly the mere fact that Barbollo said that he thought they were all right, coupled with the fact that these grenades had been produced by a previous shift and had been

approved by the inspector, was not sufficient to involve him in any wrongdoing in thus expressing his opinion.

It will be observed that she admitted that Government inspectors, David Sorin and Agnes Venetti were both present at the time (R. p. 1525), and that although she stated on her direct examination that she reported this to Captain Thompson (R. p. 1526), this she denied on cross-examination (R. p. 1544).

Neither Venetti nor Sorin were called by the Government, and Thompson did not testify to any such occurrence when he was on the stand.

As to the incident of the grenades on which she had placed a red crayon pencil mark being returned after she rejected them, she said, on direct, that these markings had been smudged off, and that she told Piteo and Costanza to take the first bunch and put them in the dog house; that there were about ten cases of them; that she then noticed them coming back with the red smudged, and that she then asked Costanza and Piteo about them, but that they kept coming through (R. p. 1529); that she then scratched an "x" on the tin, but they continued to be returned; that she told Fred Lippman, the chief inspector, and Captain Thompson about it, and that Lippman asked Costanza how he could take them out of the doghouse if they were still coming through (R. p. 1530). Costanza denied this testimony. He said that at that time he was not on the same shift with Piteo, and further, Piteo had nothing to do with the assembly room (R. p. 3050).

Piteo did not testify to any such occurrence and neither did Captain Thompson and Lippman was not called.

A careful reading of the cross examination of this witness will show that she was completely discredited, and that her

testimony was false. Had such testimony been given by an honest, truthful and reliable witness, there cannot be the slightest doubt but that Piteo was guilty of at least some of the substantive counts in the first indictment and certainly Costanza would have been convicted of conspiracy to defraud. That the jury completely rejected her testimony as false is evidenced by the fact that they acquitted all of the defendants on the first indictment and that they also acquitted Costanza of conspiracy to defraud.

Clearly, if this witness observed these circumstances, it was her duty as an inspector to report to the plant representative of the Chemical Warfare Service, and if she had reported, it would have been acted on at once. An investigation would then and there have been made, and those guilty of this flagrant violation would have been brought to brook. The fact that no such report was made, and no such action was taken, is positive proof that these incidents never occurred, and that this witness testified falsely.

Of the employee witnesses, *Wilbur Sweeney* (R. p. 826) merely testified to conversation as to changing the method of loading from putting separate increments in separate press rooms to putting all increments in in one room, to support the Government's theory that early in the manufacture there was a scheme to have this done (R. pp. 831, 835), and that Antonelli said he was much pleased with this change; that he would have a chance to make some money or more money (R. p. 837).

On cross-examination, however, he testified that he did not place any sinister import upon this suggestion; that he himself thought it was a good idea, and that he didn't think there was anything wrong in Mr. Antonelli making that remark, because it increased production (R. p. 851); that he did not get any meaning from this statement that

Antonelli meant that he could cheat the Government; that on several occasions he heard Antonelli urge the employees to carry on their operations in strict compliance with the contract (R. p. 866), saying that the employees were in the war the same as the men in the service, and that they should serve faithfully and honestly (R. p. 867); that Antonelli said it was not a question of which foreman could produce the most, but who could produce the best (R. pp. 879, 881); that he would fire anyone who deviated in the slightest degree from the contract provisions.

This leaves only eighteen employee witnesses who testified for the Government. Three of them are the foremen defendants, Piteo, Bianchi and Costanza. Not one of these gave any direct evidence as to any agreement to defraud the Government, and surely if there had been a conspiracy as claimed by the Government, these men could have testified to the conspiracy, to the arrangement made, and to the purpose of the conspiracy.

Of the remaining employee witnesses, the Government has given only their direct evidence without any attempt to point out the extent to which it was either discredited or disqualified on cross-examination.

Of these remaining fifteen witnesses, six constituted pairs of sisters, mostly all of teen age at the time of the events to which they testified. The groups of sisters are as follows: Johanna Arnone, sister of Theresa Molinari; Mary Gifaldi, sister of Edith Gifaldi; Beatrice DeFilippo, sister of Mildred Hinkley.

On cross-examination the witness, Arnone, testified (R. pp. 1033-1144) that about the middle of May, 1943 (about a month before the arrests) she signed a written statement for the FBI; that her mother, Lucy Siglioni, and her sister, Theresa Molinari, also signed statements at the same time;

that she then went back to work and continued to load the bombs in the same way that she had been doing; that the FBI told her that she had been doing something wrong to hinder the war effort, but nevertheless she continued in the same manner; that they told her it was criminal, but she went on doing the criminal act; that she did not tell anyone at the plant that she had been interviewed, except Ann Vacarelli, her pourer; that about two weeks later she was again interviewed by the FBI and she told them that she had continued to load the bombs in a criminal way (R. p. 1087).

She is one of the witnesses whom Judge Frank, in his appendix (showing that the Government's case was not "strong") demonstrated had been subjected to witness "intimidation" (p. 664, Footnote 70, p. 665).

She also said that some five or six months after her foreman, Bianchi, had told her to put in three charges, that Joe DeRites told her to put in three charges (R. p. 1109). She said that she was scared when the FBI told her she had committed a crime, and that she believed their statement, but did not expect to be punished (R. p. 1137), and that that had *influenced her action in involving Joe* (R. p. 1139); that fear had influenced her testimony (R. 1141).

It is to be noted that although this witness' mother, Lucy Siglioni, also an employee, was interviewed by the Government, she was not called as a witness (R. p. 1084).

Kiefer, although called in rebuttal (R. p. 3476), did not deny the testimony of these two sisters that he told them not to go to the office of defense attorneys nor that he had warned witnesses not to submit to questioning by defense counsel.

Furthermore, the witness was directly contradicted by Frank Mulligan, a wholly disinterested defense witness,

as to instructions she said were given in his presence (R. p. 2807).

Theresa Molinari, sister of the last witness, and daughter of Lucy Siglioni, testified that while working opposite her mother, and in her presence, Bianchi told her to put in four charges; that about three weeks later he told her again in the presence of her mother to put in four charges when the inspectors were around, otherwise to put in three when *nobody* was around (R. p. 1599); that she did this for about two weeks, then went to work on grenades under Bianchi, and followed the same practice.

On cross-examination, after detailing her interview in the presence of her mother and sister by the FBI (R. p. 1604), simply said that she didn't remember whether the FBI told her that what she was doing was criminal, but says that she was frightened (R. p. 1607), and admitted that Kiefer did come to the Stecher plant to see her and her mother (R. p. 1608); denied at first that John DeRitis had made arrangements with her to come to his lawyer's office, but couldn't remember whether she met him and her sister at quitting time outside the Stecher plant, and said she couldn't remember whether she, her mother and her sister, had ever talked to John DeRitis out near the Stecher plant about quitting time with reference to going to his lawyer's office (R. p. 1617), or that Johnny took them home after being told that they would not go to the lawyer's office as requested, and that was as strong as she could make it (R. p. 1620).

It will be observed that this witness in her testimony implicated only the defendant, Bianchi.

The witness MARY GIFALDI (R. pp. 1621-1655), told on direct examination about receiving instructions from

Piteo in the presence of Harry Washburn (a defense witness) to use three charges, and when the inspectors were around to use four. She said that a considerable time later Joe DeRitis asked her if she was using three charges, to which she replied "yes", and that he said "okay" (R. p. 1626), but that after an absence for a time from the plant, when she returned, after working a half day, they *let her out* (R. p. 1630).

On cross-examination she said she was present at the preliminary hearing (a year previous) and heard her sister, Edith Gifaldi, testify; said that she knew it was wrong to violate the specifications; that the FBI told her it was wrong, and that she had committed an offense, and that she could be punished for it, but that it didn't scare her (R. p. 1648); that she wasn't frightened because she knew the bombs fired with three charges just the same as with four (R. p. 1649).

She said with reference to the blackmail letter that her sister testified, on her preliminary examination that she wrote, that "I don't know anything about it", and when asked further whether she had ever heard of that matter, replied, "I refuse to answer. That is personal" (R. p. 1654).

We submit that the jury could very properly have disregarded this witness' testimony altogether, and could have refused to believe her statement that Joe DeRitis would give directions some several months after she had received the same directions from her foreman, Piteo.

She was further discredited by the testimony of Harry Washburn, a defense witness, who testified that the instructions were to conceal the lesser increment from Antonelli and the DeRitis boys, as well as from the inspectors (R. p. 2533).

The witness, EDITH GIFALDI (R. pp. 1673-1712) is the one who told of the incident of going to see John DeRitis about a raise in pay. Her testimony is referred to in the prevailing opinion (p. 635) as the witness who was "promised a raise for turning out more work by using a deficient number of charges", and the Government in its brief also refers to her testimony as showing that John DeRitis had promised her a raise in pay if she increased her production to sixty boxes a day, telling her that she could do it if she used three charges. But the testimony of this witness is greatly weakened by the fact that she had previously testified that nearly six months previously she had been instructed by Piteo to use the three charges instead of four in loading the bombs, and that for more than a month she had been underloading the hand grenades under Piteo's instructions.

Certainly if John DeRitis had make any such remark to her she would have replied that she had been using the three charge method of loading for a considerable time, and therefore, had earned the increase asked for (R. pp. 1675, 1677, 1678, 1679), instead of saying "I can't" get out 60 boxes a day. It finally developed that she was also "let go" by the defendants (R. p. 1682).

The jury, had there been no error, could very well find that if, there had been a conspiracy between these petitioners and the foremen, that they would not dare to have fired this witness, and the fact of her discharge would also tend to show her bias.

On cross-examination she was asked about the blackmail letter that she mentioned in her testimony on the preliminary examination. She said she didn't recall testifying to it, but admitted, when the testimony was read to her, that she had said something like that (R. p. 1697), but said that she

never addressed the letter, and that she wasn't the only girl who wrote it—that there were two others (R. p. 1710).

The witness, BEATRICE DE FILIPPO (R. pp. 1713-1755), sister of Mildred Hinkley, is the one who is referred to in the Government's brief as saying that Antonelli directed the changing of regular bombs to burster bomb trays in the presence of Joe DeRitis (brief, p. 6). She also was "let out" (R. p. 1725).

On cross-examination she admitted that in the statement she gave the FBI she didn't say anything about Antonelli being in any way connected with any wrongdoing at the plant (R. p. 1731). She said she didn't know whether she mentioned Antonelli's name in the above mentioned connection on her preliminary examination (R. p. 1732), but when her attention was called to this testimony she was compelled to admit that she said, (although she had transferred these bombs), that "I never received any instructions though" (R. p. 1755). She is also the witness referred to in both opinions as being the one who said that "they assured [her] if you would testify in a certain way you would have nothing to fear" (R. p. 1751). This assurance bore fruit in her bringing in the names of Antonelli and Joe DeRitis in her testimony, although she never mentioned their names in the preliminary hearing (R. p. 1753).

The witness, MILDRED HINKLEY (R. p. 1777-1811) also mentioned the name of Antonelli as being present in the press house when directions were given to change the regular bombs to burster boxes (R. p. 1781). But on cross-examination her attention was called to her testimony on the preliminary hearing, wherein she said that when those directions were given, Bennie Piteo was the only one who was present, and that this transferring was done under his instructions (R. p. 1790).

The Court on the trial interjected, in view of her quibbling, and said:

> "If she was asked who was present and she gave the answer [above], I think it is fair to assume that that is all" (R. p. 1793).

She also admitted, when interviewed by the FBI, that she was told that misloading the bombs was a serious matter; that she considered it "a very serious matter"; that she was frightened and said that after they had impressed her with the seriousness of the matter, they then mentioned the names of the foremen and superintendents (R. p. 1809).

Clearly, the cross-examination of this sister group greatly weakened the effect of their testimony, and it is not sufficient to justify the characterization of a "strong" case.

With the Court's indulgence, we will briefly sketch the cross-examination of the remaining Government employee witnesses.

VIOLET STEWART (R. p. 1145-1190) is the witness who said that on occasions she saw Barbollo pick up some rejects and place them on the table, and that sometimes bombs were left in the arbor press room without being inspected as to depth of powder (R. p. 1155-1158), and that Piteo had ordered to put them through (R. p. 1161). Piteo, however, had no connection whatever with the assembly room, and later she said that her foreman was Lucille Mason rather than Piteo (R. p. 1162).

On cross-examination she admitted that she had never told anyone of these occurrences until interviewed by the FBI (R. p. 1163), and that she didn't think it was her duty to report these things "because she was leaving anyway."

Strange, indeed, that this witness would never have told her forelady, Lucille Mason, nor her neighbors, Eva M. Sweeting and Emily Smith, (defense witnesses) all of whom

lived in the small Village of Spencerport where she resided, as to seeing any wrongdoing at the plant. But she finally admitted that she did not know much about the way reject bombs were marked, and did not know about bombs being set aside for surveillance tests, and could not say whether those were the bombs that Barbollo took for clustering, and admitted that bombs without the tail pieces could not be put into any cluster (R. pp. 1177-1190).

FRANCES LEONE SCHWARTZ (R. pp. 1320-1359) gave some testimony of instructions from Bianchi to put in three scoopfuls of powder, and of instructions from Joe DeRitis, but says that after the conversation (which took place in the presence of several people, R. 1325) with Joe, Johnny and Antonelli, "she threw them in the discard anyway" (R. p. 1326), and finally stated that on the grenades from which powder had dropped out of the bottom that "she would throw them away" (R. p. 1333).

On cross-examination she said that if one-third of the powder had fallen out she would not add the first fire but would throw them away (R. pp. 1341-1342).

The jury could very well minimize the testimony of this witness by reason of her admissions on cross-examination, and by reason of the further incredible fact that she detailed her conversations with Antonelli as being in fluent English, whereas the record clearly shows that Antonelli had language difficulties (Kiefer, R. p. 3763), and was very difficult to understand (Lucille Mason, R. p. 2699).

ANN VACARELLI (R. pp. 1360-1457) is also referred to in the Government's brief as using three heaping cupfuls instead of our level cupfuls, except when the inspectors were around (brief, p. 4), and saying that by so doing she could double the number of bombs that could be produced in one day (brief, p. 5).

But on cross-examination she said that she was frightened when interviewed by the FBI and was told that she had been committing a crime, which she believed, but that she did not have any intent to harm the war effort. She said further that Antonelli never told her to do anything wrong, and never gave her any wrong orders, and when she worked under Bianchi she never saw anything wrong, nor did she hear wrong orders given; that it was after the FBI had questioned her about "higher-ups" that she mentioned the names of the foremen.

Excerpts from her testimony given to defense counsel was then read to her, wherein she was asked the question:

"And Costanza is the only one who ever told you to do it wrong?

A. Yes."

She admitted that she remembered being asked and answering that question, and admitted that she was also asked:

"If those were done wrong as far as you are concerned, it was Costanza to blame and no one else?

A. He was my foreman.

Q. Nobody else ever told you to do it wrong?

A. No.

Q. If Mr. Antonelli came around while you were putting in one charge instead of three, you would have done it right.

A. Yes" (R. pp. 1408-1410).

The witness, JOSEPHINE M. FAZIO (R. pp. 1458-1496), on direct examination involved only Piteo in giving improper instructions as to the loading of the bombs and grenades, but said that Joe DeRitis "used to come in and remain a few minutes".

On cross-examination she admitted hearing Antonelli address employee meetings, saying that he wanted good work according to specifications (R. p. 1494), and admitted that Piteo lived across the street from her, and that

she rode back and forth to work with him. She said that she never saw anything done wrong while she worked under Barbollo, but that on the other hand, he impressed on her to do the work right and live up to the specifications (R. p. 1478).

The witness, EDITH DOCTOR (R. pp. 1497-1516) is also referred to in the Government's brief as testifying that Joe DeRitis and Piteo took grenades which had been rejected and inserted fuses and put them in a box for shipment (brief, p. 7). She is also referred to in the prevailing opinion as one of the witnesses who testified to saying the DeRitis Brothers placed rejected grenades in the outgoing line of production (Opinion, p. 653).

But when cross-examined as to the incident of Joe DeRitis and Piteo coming to the plant at night when she was there alone, stated that there were only twelve grenades thus passed along, and she then said:

> "I got the people awake now. I understand they fall asleep in here".

Her testimony was incredible, and we are surprised that the Government would even refer to it. The very idea that Joe DeRitis and Piteo would drive twelve miles in the country at night for the purpose of passing through twelve grenades at 17½¢ is incredible. Furthermore, neither she nor these two employees could have been in the plant at night when it was not in operation.

Later on cross-examination she admitted that subsequently she was appointed a company inspector; that she was instructed by Joe DeRitis as to her duties; that he told her to watch the bombs, that had been inspected by the Government, and if she saw any that were bad, she was to reject them; that later Barbollo gave her the same instructions (R. p. 1508). She said that she didn't keep a record

of her rejects, but when shown records bearing her handwriting and her signature (Ex. J-2), she admitted that as shown by this record she had rejected twenty-three bombs after they had been accepted by the Government inspectors (R. p. 1512), and admitted that there was no one else working in the assembly room on the night that Joe and Piteo were supposed to have come there (R. p. 1514), and admitted that these very grenades would again have to pass through Government inspection (R. p. 1518).

The witness, EDITH MURRELL (R. pp. 1656-1672), is one of the witnesses who testified to instructions by Piteo to put in three charges except when inspectors were around. She involved no other defendants.

On cross-examination her relations with Piteo were shown to be intimate, if not questionable. Her testimony was wholly innocuous until the very end, when the prosecution asked her the highly prejudicial and irrelevant question as to whether anyone had been out to her house the night before, and she answered: "Mr. Antonelli", but that she did not let him in.

On re-cross-examination, she testified that she did not know whether Antonelli was looking for Mr. Vogel, with whom she was living. There was nothing to show that Antonelli knew of the fact that she was living with Vogel, and he could have been seeking to interview Vogel, who also worked at the plant, as a possible witness (R. p. 1670).

The witness, ALMA GUNTHER (R. pp. 1756-1776) is referred to in the Government's brief as having testified that Joe DeRitis on several occasions took bombs which had been rejected, becaus the first fire mixture was too low, and inserted nose plugs in them (p. 6 bottom).

On direct examination she said she observed this several times, but not when inspectors were present (R. p. 1759).

On cross-examination she refused to answer as to whether there had been discussions between the inspectors as to whether certain bombs should be rejected or not, but admitted that there were occasional controversies with the inspectors over whether a bomb should be rejected or passed. At first she said she didn't think there was anyone else present when she observed Joe passing rejects, then saying that several were present. At first she refused to name them until the Court advised her that the question was proper, and then she mentioned her forelady, several of her neighbors who also lived in Spencerport, and the Government inspector. She also said that she had never mentioned these incidents "until I had to" (R. pp. 1761-1764), and she finally said she did not know of her own knowledge whether the bombs were rejects; that it was merely an opinion on her part. The Court then denied a motion to strike out her testimony.

On further cross-examination, she said she didn't tell Hazel Broadbent, the Government inspector, who was her neighbor, about the incident, nor any other Government inspector; "that it was none of my affair," and that she didn't know at the time whether or not it was wrong (R. p. 1769).

As against her testimony, Emily Smith, Eva M. Sweeting, and other defense witnesses, testified that it was impossible to start assembling bombs until they had passed through the hands of the Government inspector.

The witness, NINA LA DELFA (R. pp. 1812-1831), is also mentioned in the Government's brief as one of the witnesses who testified as to instructions to use three heaping cups of therm-8 instead of four level cupfuls (p. 4), and also of hearing Joe DeRitis give those instructions to Bianchi (R. p. 1814).

On cross-examination, she said that when interviewed by the FBI they told her it was a serious matter to underload the bombs; that she had committed a crime; that she believed it; that she was scared; that after that they asked her about her foremen, superintendents and about Antonelli (R. p. 1826). She finally admitted that her memory is now based upon the statement she gave the FBI rather than her memory in recalling the events (R. p. 1830).

This witness was later recalled by Costanza's counsel (R. p. 2780), and said that she was confused when she testified for the Government on direct that about the first of December Costanza told her to use two charges, but four when the inspectors were around, while she was working on grenades. She then said that she did make that statement when she signed for the FBI, because the FBI told her that, but that she was not sure that that was the fact, but she thought it best to follow the statement that she had given the FBI; that she was confused when she was on the stand.

The witness, ALBERT O. HALL (R. pp. 2018-2046), is referred to in the Government's brief as having testified that he saw Barbollo take bombs which had been rejected by Government inspectors and place them back on the table beyond the point of inspection for clustering (p. 6).

On cross-examination, however, he qualified his testimony as to bombs being brought in without tail fins on them (R. p. 2038); admitted that the point of defect on the bomb had a circle drawn around it, which would make it plainly visible (R. p. 2041), and quibbled on the question of whether the Government inspectors were present when these so-called rejects were being passed through.

On direct, at first he said this was done in the presence of the inspectors (p. 2026); later said they were out to

lunch, or mornings before they came to work (R. p. 2028), but that he never reported this to the inspectors (R. p. 2030).

On cross-examination, he said this transferring was done while operations were going on during working hours (R. p. 2035); that the inspector was right at the inspection table; that the inspector could see it (R. p. 2037); that there were no tail fins on those bombs, finally saying that the fins were on when they came through the assembly line (R. 2038), and admitting that rejects were marked with a black penciled circle, plainly visible to the inspector, and if again passed through the line, would be seen and again rejected (R. p. 2039). He then admitted that there was a time when the company police came to his house and took a bomb away from him (R. p. 2043); that he had borrowed $25.00 from Antonelli and did not pay it back (R. p. 2045).

This is the witness who shortly after he testified was convicted of carnal abuse of a child, and on the strength of which a motion was made for a new trial on the ground of newly discovered evidence (R. pp. 3862-3870).

There remains to be discussed only the three foremen who were indicted with these petitioners, to wit: Piteo, Bianchi and Costanza, the first two of whom have pleaded guilty, and the third having been acquitted by the jury.

THE SIGNIFICANT THING WITH REFERENCE TO ALL OF THESE THREE MEN WHO TESTIFIED AS WITNESSES FOR THE GOVERNMENT IS THAT NOT ONE OF THEM TESTIFIES TO THE EXISTENCE OF ANY CONSPIRACY, OR OF ANY AGREEMENT, OR OF ANY PLAN OR SCHEME. IN FACT, THEIR TESTIMONY IS EXACTLY THE OPPOSITE. THEY NEVER CONFERRED WITH THE PETITIONERS OR

ANY OF THEM, EVEN AFTER THEY KNEW THAT THE FBI WAS INVESTIGATING AND THEY WERE UNDER SUSPICION.

Even Costanza admitted on the trial that he lied to Johnny DeRitis as to have been interviewed by the FBI (R. p. 3184).

The cross-examination of these men clearly demonstrated that these three foremen were the root of all of this trouble in the Antonelli plant. Piteo was a disturber. He started trouble among the shifts, and even went to the extent of causing his shift to break up the machines so that they could not be used by the succeeding shift (R. pp. 2764, 2773, 2776). He admitted that he tested the bombs as to whether they were just as effective with three increments as with four, and found that they were.

Defense witness, Washburn, testified that Piteo told him that he (Piteo) had tested the bombs and found out as near as he knew that they were perfect; that he had made some tests and tried them, and found that they worked all right (R. p. 2539), and defense witness, Marella, testified that Piteo told him just before the trial that he was going to put the whole blame on Antonelli "to save his own skin" (R. p. 2781); that the testimony of Government witnesses as to loading the bombs with less than three increments—that is, using one or two charges, "was a big lie"; that the only thing that he did wrong was when he used the big cup and put in three charges, but that the same amount of powder was put in as would be with four charges. He did not tell Marella that this was the result of any agreement or conspiracy with the petitioners (R. p. 2786); he does not testify that he ever conferred with these petitioners as to making of tests, or that he told them the result of the tests (R. p. 1891).

The bitterness of all of them against these defendants, especially Antonelli, was clearly demonstrated upon their respective cross-examinations. It is quite apparent that they hoped to benefit themselves by implicating Antonelli and the other petitioners.

This, in substance, is the Government's case.